UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**
	)
Zaclon, Incorporated,	**)**
Zaclon LLC, and	**) Docket No. RCRA-05-2004-0019**
Independence Land Development Company,	**)**
	)
Respondents	**)**

ORDER GRANTING COMPLAINANT'S MOTION FOR LEAVE TO SUPPLEMENT PREHEARING EXCHANGE

On October 14, 2005, the Second Amended Complaint in this matter was filed, which added to the Complaint a second count of violation, alleging that Respondents stored and treated hazardous waste without a permit or interim status, in violation of the Resource Conservation and Recovery Act, Section 3005(a), 42 U.S.C. § 6925(a), and the implementing state regulations in the Ohio Administrative Code (OAC) 3745-50-45. On November 2, 2005, Respondents answered the Second Amended Complaint, denying the new alleged violation. Complainant subsequently supplemented its Prehearing Exchange to submit three documentary exhibits in support of Count 2. On November 23, 2005, Complainant filed a Motion for Leave to Supplement Pre-Hearing Exchange, seeking to add six proposed documentary exhibits to its Prehearing Exchange, numbered Exhibits 22 through 27. On December 6, 2005, Respondents filed a Response thereto, stating that they do not object to Exhibits 23 through 27, but that they do object to portions of Exhibit 22. To date, no reply to the Response has been filed by Complainant.

Complainant's proposed Exhibit 22 is a letter dated November 14, 2005, from Ms. Karen Nesbit of the Ohio Environmental Protection Agency (OEPA) to Mr. John Curry of Zaclon LLC (Zaclon), with attachments. The letter is a Notice of Violation based on OEPA's hazardous waste compliance evaluation inspection of Zaclon's facility on August 10-12, 2005, upon which the allegations of Count 2 are based. The violations listed therein include, in Paragraphs 1.a through 1.d, establishing and operating a hazardous waste facility without a permit and storing hazardous waste without a permit. The letter lists 27 other alleged violations of Ohio hazardous waste regulations, and other hazardous waste concerns at the facility. Attached to the letter are a RCRA Subtitle C Site Identification/Verification Form and several inspection checklists from the August 10-12 inspection.

Complainant points out that Paragraph 1.c of the letter is most relevant to the question of

liability as to Count 2, but asserts that the whole letter, together with the OEPA Field Report of the August 10-12 inspection, will be relevant to the question of the appropriate penalty on both Counts 1 and 2.

Respondents in their Response state that they strongly disagree that the proposed Exhibit 22 is relevant to the penalty. Respondents assert that if the entire Exhibit 22 is allowed to be supplemented into Complainant's Prehearing Exchange, then Respondents would move to strike all parts of the letter except parts 1.a, 1.b and 1.c, and to strike the documents attached to the letter, as irrelevant and prejudicial. Respondents assert that the documents raise many issues which they would be compelled to respond to in this case, requiring a huge expenditure of time and resources and supplementation of Respondents' Prehearing Exchange with voluminous documents that are irrelevant to this case. Furthermore, Respondents assert that proposed Exhibit 22 contains unproven allegations by an Ohio inspector, to which Respondents have not responded yet.

Respondents' opposition to the inclusion of portions of Complainant's proposed exhibit in its Prehearing Exchange is in essence a motion in limine, which is generally the vehicle for excluding testimony or evidence from being introduced at a hearing. Respondents request the exclusion of the evidence on the basis that it lacks relevancy, which is an appropriate basis for a motion in limine. Accordingly, Respondents' Response to the Motion for Leave to Supplement will be considered as a motion in limine.

The Consolidated Rules of Practice (Rules) provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). The Rules do not refer to motions in limine. In the absence of administrative rules on a subject, it is appropriate to consult Federal court practice, Federal Rules of Civil Procedure or the Federal Rules of Evidence as guidance in analogous situations. *See, Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB, July 31, 2002); *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n. 20 (EAB 1993); *Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993). In Federal court practice, a motion in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F.Supp. 2d 966, 969 (N.D. Ill. 2000). Motions in limine are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill 1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Id*. at 1401. Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without the context of the trial the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

Evidence as to the penalty issue must be relevant and of probative value as to the criteria set forth in the statute for determining a penalty. The criteria set forth in Section 3008(a) of RCRA are "the seriousness of the violation and any good faith efforts to comply with the applicable requirements." 42 U.S.C. § 6928(a). Pursuant to those criteria, the RCRA Civil Penalty Policy (October 1990) provides the following factors to be taken into account in calculating a penalty: potential for harm, extent of deviation from a statutory or regulatory

requirement, economic benefit of noncompliance, good faith efforts to comply, degree of willfulness or negligence, history of noncompliance, ability to pay, and other unique factors.

In its prehearing exchange, or in moving to supplement the prehearing exchange, a party is not required to explain the relevancy of its exhibits to the issues presented. The relevancy of a document may not be readily apparent on its face. Complainant's proposed Exhibit 22 may include information that is relevant to one or more penalty factors in the RCRA Penalty Policy. It cannot be determined at this time that any certain parts of Complainant's proposed Exhibit 22 are irrelevant and clearly inadmissable for any purpose with respect to this case. Before it is admitted into evidence, Complainant will have to lay a foundation for the exhibit at the hearing, and if Respondents object to some portions of it as irrelevant, Complainant will have to explain their relevancy to the statutory penalty factors and/or the factors listed in the RCRA Penalty Policy. Respondents will have the opportunity at the hearing to state their position as to admissibility of or evidentiary weight to be given to those portions.

This conclusion does not compel Respondents to produce documents that are responsive to Complainant's proposed Exhibit 22 but that are irrelevant to this litigation. Respondents may, however, move to supplement their Prehearing Exchange with any additional documents which *are* relevant to the statutory penalty criteria and/or the factors in the RCRA Penalty Policy.

In administrative proceedings, there is no jury to be prejudiced by viewing evidence which is not ultimately admitted at trial. In rendering a decision, the Presiding Judge can only consider the evidence which is admitted at the hearing, and after weighing that evidence, must state findings of fact and conclusions of law, explain how the penalty assessed corresponds to the statutory penalty criteria, and set forth the reasons for any increase or decrease from the Complainant's proposed penalty. 40 C.F.R. § 22.27(b). Therefore, the fact that a document is in the prehearing exchange but not admitted into evidence, or the fact that a document is admitted but accorded little evidentiary weight, would not be prejudicial to a party.

Accordingly, Complainant's Motion for Leave to Supplement the Prehearing Exchange with proposed Exhibits 22 through 27 is hereby **GRANTED.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: December 20, 2005
Washington, D.C.